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OFFICE OF PETITIONS

In re Application of :
Delbert Lee Hartman :
Application No. 10/646,181 : ON PETITION
Filed: 25 August, 2003 :
For: TRASVERSE DISC MOTOR :

This is a decision on the paper filed on 19 January, 2006, which is treated as a petition to withdraw the holding of abandonment.

This application became abandoned on 29 August, 2005, for failure to file a proper reply to the Notice of Non-Compliant Amendment mailed on 28 July, 2005, which set a one (1) month shortened period for reply. No extensions of time in accordance with 37 CFR 1.136(a) were obtained. On 30 December, 2005, a Notice of Abandonment was mailed.

Petitioner asserts that a timely reply to the Notice of Non-Compliant Amendment was mailed via Certified Mail on 17 August, 2005, and was received in the USPTO on 22 August, 2005. In support, petitioner has provided a copy of a USPS postage receipt dated 17 August, 2005, and a certified mail return postcard stamped 22 August, 2005, by the USPTO. A copy of the response is provided with the present petition.

The arguments have been considered, but are not persuasive. The U.S. Patent and Trademark Office (Office) file is the official record of the papers filed in this application. A review of the papers filed reveals that no reply to the Notice of Non-Compliant Amendment was received in the USPTO on 22 August, 2005, or on any other date prior to the filing of the present petition. An applicant alleging that a paper was filed in the Office and later

misplaced has the burden of proving the allegation by a preponderance of the evidence. The fact that petitioner believes that the application was (or should have been) received in the Office on 22 August, 2005, is not more persuasive than the date the papers are shown to have been received in the official file. At best, the record shows that applicants intended to file the papers in question in the USPTO by first-class mail on or before 22 August, 2005, but the evidence, unfortunately, does not show that the USPTO timely received the response. Petitioner should also note that while there is no provision in the rules of patent practice permitting the Office to accord a filing date to application papers based on the date the papers were deposited in USPS Certified Mail service, the USPTO has a long-established and well publicized practice for *prima facie* establishing the date of receipt of correspondence that has either been mailed or otherwise delivered to the PTO, and is asserted to have been subsequently misplaced: the itemized postcard receipt practice of MPEP 503.¹ This practice requires that any paper(s) for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper(s). A postcard receipt which itemizes and properly identifies the paper(s) which is being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. However, due to the absence in the record of a postcard receipt itemized with respect to the patent-related papers that bears a USPTO date stamp of 22 August, 2005, showing that the response to the Office communication in question was received at the USPTO on the date alleged in the petition, the date of receipt must reasonably remain 19 January, 2006, the date that the record adequately shows that these papers, along with the present petition, were first received at the USPTO.

37 CFR 1.8 provides:

(a) Except in the situations enumerated in paragraph (a)(2) of this section or as otherwise expressly excluded in this chapter, correspondence required to be filed in the U.S. Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

¹ The public was afforded a "reminder" of the then extent post card receipt practice at 857 Off. Gaz. Pat. Off. 667 (O.G.) (Nov. 21, 1968). This specific notice is usually repeated annually, in a January "Consolidated Listing" section of the O.G. that contains important O.G. notices of continuing relevance.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or

(B) Transmitted by facsimile to the Patent and Trademark Office in accordance with § 1.6(d); and

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

...

(b) In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the U.S. Patent and Trademark Office after a reasonable amount of time has elapsed from the time of mailing or transmitting of the correspondence, or after the application is held to be abandoned, or after the proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

(1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;

(2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and

(3) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Director to the previous timely mailing or transmission. If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement.

The showing of record is that petitioner failed to utilize the Certificate of Mailing procedures.

As petitioner failed to avail himself of the protections set forth in 37 CFR 1.6, 1.8, and MPEP 503, petitioner has provided

no persuasive evidence that a reply was timely filed to the Notice mailed on 28 July, 2005.

Furthermore, with regard to the Notice of Abandonment, petitioners were advised in the Notice mailed on 28 July, 2005, of the deficiencies in their submission of 28 February, 2005. While the Office attempts to timely mail a Notice of Abandonment, it is under no obligation to do so. The failure to receive a Notice of Abandonment, or any deficiencies therein, do not constitute grounds for withdraw of the holding of abandonment.

In summary, petitioner has presented no evidence that a reply to the Notice mailed on 28 July, 2005, was filed. In this respect, while petitioner argues that he was not timely informed that a proper response was not received, it is noted that while the Office attempts to provide timely notification of an incomplete response, it is under no obligation to do so. Rather, it is petitioner's responsibility to file a complete and timely response.

As such the application is properly held abandoned.

The petition is **DISMISSED**.

The petitioner may want to consider filing a petition to revive under 37 C.F.R. 1.137(b). A copy of the petition form is enclosed for petitioner's reference.

Any request for reconsideration must be filed within **TWO (2) MONTHS** of the date of this decision.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (571) 273-8300
 Attn: Office of Petitions

By hand: Customer Service Window
 Mail Stop Petition
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3231.

A handwritten signature in black ink, appearing to read "D. Wood".

Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

Encl: PTO/SB/64